Supreme Court of the United States

OCTOBER TERM, 1903.

NO. 541.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error.*

vs.

BARBER ASPHALT PAVING COMPANY, - }
THE CITY OF LOUISVILLE, - - } *Defendants in Error.*

Notice of Motion to Dismiss or Affirm.

The plaintiff in error, the Louisville & Nashville Railroad Company, and its counsel, James P. Helm, Esq., and Helm Bruce, Esq., will take notice that on Monday, November 28, 1904, in the court-room of the Supreme Court of the United States in the city of Washington, D. C., at or about the hour of twelve o'clock m., at the motion hour of the court, the defendants in error will move the court aforesaid to dismiss the writ of error in this cause for want of jurisdiction in the court, and will also move said court to affirm the judgment to which said writ of error purports to have been prosecuted on the ground that it is manifest that said writ of error was taken for delay only; and manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument. In support of said motions the defendants in error will file a brief, a copy of which accompanies this notice.

BENJAMIN F. WASHER,
WILLIAM FURLONG,
HENRY L. STONE,
Counsel for Defendants in Error.

As counsel for plaintiff in error I acknowledge service of the within notice, and also acknowledge receipt of a copy of the motion referred to in said notice, and the further receipt of copy of brief in support of said motions.

HELM BRUCE,

Counsel for Plaintiff in Error.

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BARBER ASPHALT PAVING COMPANY, - }
THE CITY OF LOUISVILLE, - - } *Defendants in Error.*

Motion to Dismiss or Affirm.

Defendants in error come, and by their counsel appearing in their behalf, move the court to dismiss the writ of error in this case for want of jurisdiction in the court. As ground for said motion to dismiss it is represented to the Court that the judgment and decree from which the said writ of error purports to have been prosecuted is a judgment and decree of the Court of Appeals of one of the States of the United States, to-wit: Court of Appeals of Kentucky, and said judgment or decree is not founded or based on a federal question, and does not involve the constitutional provision requiring "due process of law," "the equal protection of the laws," or any federal question. Said judgment of the Court of Appeals of Kentucky involves only the question as to whether the property of the plaintiff in error is included within the statute of Kentucky providing for special taxation, and the construction placed on said statute of Kentucky is in accord with the established rule long prevalent in said State, and in no way presents a constitutional or federal question.

The judgment of the Court of Appeals from which the writ of error purports to have been prosecuted decides that the

statute of the State of Kentucky providing a general scheme for assessing the cost of public improvements is legal and constitutional as this Court had previously held in Walston vs. Nevin, 128 U. S., 578. Said judgment also decided that the property of the plaintiff in error was contemplated by and subject to the provisions of the Kentucky Statute aforesaid.

Defendants in error, by counsel, also move the Court to affirm the judgment of the Kentucky Court of Appeals aforesaid, for the reason that, although the record in the case may show that this Court has jurisdiction in the premises, yet it is manifest that the said question upon which the said writ of error is based is so frivolous as not to need an argument, said question having been decided by the Court of Appeals of Kentucky in conformity with the rulings of this Court on the same issue, and the repeated decisions of said Kentucky Court of Appeals. Accordingly it is manifest that the writ of error was prosecuted for delay only.

BENJAMIN F. WASHER,
WILLIAM FURLONG,
HENRY L. STONE,

Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - *Plaintiff in Error.*

vs.

BARBER ASPHALT PAVING COMPANY, THE CITY OF LOUISVILLE, - *Defendants in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendants in Error on Motion to Dismiss or Affirm.

STATEMENT OF CASE.

During the year 1900, the City of Louisville by proceedings, admittedly proper, improved Frankfort avenue, a public way of Louisville. The cost of constructing the street was assessed under section 2833 of the Kentucky Statutes against the property in all quarter squares abutting upon the improvement, each lot being required to pay according to the number of square feet contained therein. The full text of the several sections of the Kentucky Statutes providing a plan of special taxation for local improvements will be found in the appendix to this brief.

Within the territory liable to taxation for the cost of the improvement of Frankfort avenue was a strip of ground containing about 100,000 square feet upon which was located the

roadbed and tracks of the Louisville & Nashville Railroad Company, which owned and held the real estate as a perpetual right of way. The municipal authorities assessed the property of the railroad company and issued warrants to the Barber Asphalt Paving Company on an apportionment of the cost. The warrants remaining unpaid, the Barber Asphalt Company instituted suit to enforce collection.

The original answer of the railroad company set forth two defenses. (1.) That the railroad owned within the district liable to assessment only a perpetual right of way which the Kentucky Statutes do not require or permit to be taxed. (2) That the road's right of way was not benefited by the improvement, and any assessment in the absence of benefit would be a taking of its property without due process of law, and a denial of the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. Record page 16.

The Circuit Court of Jefferson County, Kentucky, speaking through its Chancellor, held in an exhaustive opinion that the answer of the railroad company was not sufficient in law. Record pages 19-31. The decision of the Jefferson Circuit Court was based on the propositions that the perpetual right of way of the Louisville & Nashville Railroad Company was property such as might and should be taxed under the Kentucky Statutes for the cost of a local improvement, and further, that the Legislature of Kentucky, having designated the territory and property that might be benefited by the improvement of the street, such determination was conclusive upon owners and the Court.

The railroad company then filed an amended answer setting forth that the apportionment of the cost had been erroneously made, and the Jefferson Circuit Court sustained the contention. Thereupon, acting under authority conferred by the statutes to make all corrections required to do justice to all parties concerned, the Court, by its commissioner, reapportioned the cost of the improvement, and reduced the charge against the railroad company about $300. Judgment was afterwards rendered against the property of the railroad in

the sum of $3,176.72, and the property ordered sold to satisfy the lien of the contractor. (Record page 50.)

An appeal was prosecuted by the railroad company to the Court of Appeals of Kentucky, where the judgment of the lower court was affirmed. The Appellate Court held, as the Circuit Court had ruled, that the provisions of the assessment laws of Kentucky included such property as the railroad company owned, and that the perpetual right of way was liable for its proper proportion of the cost of constructing Frankfort avenue. The Appellate Court also sustained the Circuit Court in the opinion that the legislative determination of benefits under the statutes of Kentucky was conclusive on owner and court and in no way violated the provisions of the Fourteenth Amendment. (Record pages 68-70.)

A writ of error to review the decision of the Kentucky Court of Appeals was allowed by this Court, and the defendant in error is now here moving that the writ be dismissed for want of jurisdiction or the case affirmed as a delay case.

ARGUMENT.

I.

If any question is apparently settled in this Court it is that attempted to be presented by plaintiff in error in its attack upon the constitutionality of the Statutes of Kentucky providing a plan of assessing the cost of local improvements. In French vs. Barber Asphalt Paving Company, 181 U. S., 324, this Court decided, as it had previously held in many cases, that the scheme of special assessment in vogue in Kentucky was not repugnant to any provision of the federal constitution.

More important on this submission is the fact that this Court has had under review the identical statute and same issue as here presented, and decided that the Kentucky legislature had acted within its constitutional power in the enactment of the assessment laws of the State. See Walston vs. Nevin, 128 U. S., 578.

If then it requires no argument in support of the constitu-

tionality of the statutes under which this case arose, the only remaining contention on the part of the plaintiff in error is to the effect that its perpetual right of way is not such property as was contemplated by the assessment laws of Kentucky. This question seems to have no aspect justifying an appeal to this Court. The decision of the Court of Appeals of Kentucky holding that the property of the Louisville & Nashville Railroad Company was within the provision and subject to the burdens of the Kentucky tax laws was based in no way on a federal question. It was nothing more than a construction by the supreme court of Kentucky of a statute of the State.

II.

In Walston vs. Nevin, 128 U. S. 578, this Court, under a writ of error to the Kentucky Court of Appeals, was called upon to consider the application of the Fourteenth Amendment of the Constitution of the United States to the Statutes of Kentucky governing special assessments. The statute quoted by Mr. Chief Justice Fuller in his opinion will be found upon examination to be the same statute as here on review. (See appendix.) After a reference to the Kentucky authorities construing the statute and the case of Davidson vs. New Orleans, 96 U. S. 97, this Court said:

"The conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constituton. So the determination of the taxing district and the manner of apportionment are all within the legislative power. Spencer vs. Merchant, 125 U. S. 345; Stanley vs. Supervisors, 121 U. S. 535, 550; Mobile vs. Kimball, 102 U. S., 691; Hagar vs. Reclamation District No. 108, 111 U. S., 701; United States vs. Memphis, 97 U. S., 284; Laramie County vs. Albany County, 92 U. S.,

307. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. Wurts vs. Hoagland, 114 U. S., 606; Railroad Company vs. Richmond, 96 U. S., 521, 529. The remedy for abuse is in the State Courts, for, in the language of Mr. Justice Field, in Mobile vs. Kimball, 'this Court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation.'

"As the question raised in these cases is a Federal question (Spencer vs. Merchant, supra), we will not sustain the motions to dismiss; but as there was, in our judgment, color for those motions, and the contention now made has often been pressed upon our attention before, and as often determined adversely, so that the rule must be regarded as settled, we shall grant the motions to affirm."

Several of the many cases and quotations approved in French vs. Barber Asphalt Paving Company, 181 U. S., 324, are here reproduced:

"The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review.

"The question of special benefit and the property to which it extends is of necessity a question of fact, and when the Legislature determines it in a case within its general power its decision must of course be final. * * * In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden, and having the power we cannot criticise the reasons or manner of its action." Opinion of the Court of Appeals in Spencer vs. Merchant, approved by this Court.

"The Legislature has the power to determine, by the statute imposing the tax, what lands, which might be ben-

fited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited." Spencer vs. Merchant, 125 U. S., 345.

"It has been held in this Court that the Legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question." Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

"Unless the Legislature decides the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken." Walston vs. Nevin, 128 U. S., 578.

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the Legislature, and may be directed to be in proportion to the position, the frontage, the area or market value of the lands or in proportion to the benefits as estimated by the commissioners. Bauman vs. Ross, 167 U. S., 548."

"The question thus raised has been so often and so carefully discussed both in the decisions of this Court and of the State Courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing powers. * * * Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States. Here the Court has decided that the proceeding below was in accordance with

the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States. * * * What was complained of was an orderly procedure under a scheme of local improvements prescribed by the Legislature and approved by the Courts of the State as consistent with constitutional principles. The judgment of the Supreme Court of Missouri is affirmed." French vs. Barber Asphalt Paving Co.

The plan of assessment attacked in the instant case has uniformly been sustained as constitutional by the Court of last resort in Kentucky.

McFerren vs. Alloway, 14 Bush, 580.
Ludlow vs. Railroad Co., 78 Ky., 573.
Purdy vs. Drake, 17 Ky. L. R., 819.
Allen vs. Wood, 20 Ky. L. R., 860.
Bullitt vs. Selvage, 20 Ky. L. R., 599.
Preston vs. Rudd, 84 Ky., 156.
Barfield vs. Gleason, 111 Ky., 291.

The procedure and rules approved by the courts of Kentucky do not tolerate any such abuses as Mr. Justice Harlan fears in his dissenting opinion in French vs. Barber Asphalt Paving Company. The settled law of the State does not permit of spoliation, and no assessment is sanctioned where the "cost equals or exceeds the value of the property specially taxed." See opinion of the Court of Appeals, record page 68.

This feature of the Kentucky law is emphasized in the latest announcement on the subject. Bitzer vs. Fulton, 24 Ky. L. R., 2263; 73 S. W. Rep., 1115.

"The method of assessment by the foot has been followed so long and has been so often approved by this Court that it no longer remains an open question. (Preston vs. Roberts, 75 Ky., 570; Nevin vs. Roach, 86 Ky., 492.) The rule also is that while these assessments rest upon the basis of benefits, or presumed benefits, to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown, the judgment of the City Council being conclusive as to the propriety of the improvement. (Pearson vs. Zabel, 78 Ky., 174; Ludlow vs. Trustees, 78 Ky., 360; Preston vs. Rudd, 84

Ky., 156; Covington vs. Schultz, 16 Ky. L. R., 831; Allen vs. Wood, 20 Ky. L. R., 61; Bullitt vs. Selvage, 20 Ky. L. R., 599.) On the other hand, it is held that when owing to extraordinary facts the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. (Covington vs. Southgate, 54 Ky., 491; Louisville vs. Rolling Mill Co., 66 Ky., 416; Broadway Baptist Church vs. McAfee, 71 Ky., 508; Preston vs. Rudd, 84 Ky., 150; France vs. Jacob, 88 Ky., 532; James vs. Louisville, 19 Ky. L. R., 447.)"

III.

The contention of counsel for plaintiff in error that the perpetual right of way of the railroad is not property to be taxed under the Kentucky law of special assessments, does not seem to present a question determinable in this Court. As said before, the decision of the Court of Appeals of Kentucky respecting this phase of the litigation did nothing more than place a construction upon the Statute of Kentucky in defining what was meant by the terms "lot," "property" and "square feet owned," as used in the provisions governing local improvements.

Such construction will be adopted by this Court if the Legislature might rightfully have done what the interpretation of the State Court says it did.

Commercial Bank vs. Buckingham, 5th How., 326.

Murray vs. Gibson, 15 How., 423.

Guthrie on Fourteenth Amendment, page 44.

IV.

The perpetual right of way of the Louisville and Nashville Railroad Company was taxable in this case. The company owned and held the land as its absolute, exclusive property. No attempt was or will be made to find a servient estate to show that the road held only a dominant easement. The vague, indefinite possibility of reversion in some unknown and

unknowable person is certainly not property to be taxed for the cost of the street. Such being the case, unless the real estate has ceased to exist, the railroad must own property as contemplated by the statute.

"The words employed in the deed express absolute dominion and complete enjoyment. These constitute property and all that is understood in proprietorship." Caldwell vs. Fulton, 21 Pa., 763.

Judge Brewer, in Keener vs. Union Pacific, 31 Fed. Rep., 128, said:

> "The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to indicate that strip which the railroad company appropriates for its use and upon which it builds its roadbed. Obviously, the term in the statute in this case has the latter significance, and taxation is to be upon that strip, assessed at its full cash value, which the railroad company has appropriated and is using as its right of way, and upon which, to its entire width, it has placed its tracks and side tracks."

In Kentucky it has never been held that the owner of a fee is alone taxable. Thus a life tenant must pay the cost of public improvements. Hackworth vs. Artificial Stone Company, 20 Ky. L. R., 1789. Charitable institutions, vested only with the use of property during a prescribed time and for a definite purpose, have always been required to meet the burdens of local taxation.

The previous rulings of the Kentucky Court of Appeals on the question of assessment of railroad rights of way are indicated in the opinions of Railroad Company vs. Obst and Stengel, decided February 18, 1875, and City of Ludlow vs. Southern Railroad, 78 Ky., 357. The following quotations from the above cases are found in the Ludlow opinion:

> "Real property held by railroad companies within the corporate limits of the City of Louisville is not exempt from street taxation. The terms of the grant of the power to tax for such purposes included all real estate, and that held by railroad companies, like that held by churches, colleges

and hospitals, and other institutions of like character, must bear its proportion of local burden. There is no constitutional restriction upon the power of the Legislature to impose local taxation upon railroad companies. It is a mere question of policy."

"The rulings of the Court of last resort in other States are almost uniformly in accord with the decision of this Court upon this question.

"In the City of Chicago vs. Baer (41 Ill., 306), it was held that a street railway was subject to assessment for the improvement of the street on which it was located.

"In the Northern Indiana R. R. Co. vs. Connelly (10 Ohio State, 164), it was held that the roadbed was assessable for the street improvement, notwithstanding the fact that the company derived no benefit from the improvement of the street.

"In the B. & M. R. R. Co. vs. Spearman (22 Iowa, 112), the depot grounds were held to be subject to assessment for street improvement.

"To the same effect are the cases of City of New Haven vs. Fair Haven and Westville R. R. Co., 38 Conn., 422; Street Railway Appeal, 32 Cal.; State vs. Newark, 3 Dutcher (N. J.); Taylor vs. Palmer, 31 Cal.; Drainage Co. Case, 11 La. Am.; Emery vs. Gas Co., 28 Cal.; State vs. New Brunswick, 1 Vroom; and Orance and Alexander Railroad Co. vs. the City of Alexander, 17 Grattan.

"We think that, both upon reason and authority, a lot held and owned by the railroad company as this is held and used, is as much subject to assessment for street improvements as if it belonged to a natural person. In the law authorizing the assessment there is no exemption of railroad property, nor exemption of property because of its application to certain uses."

The weight of authority in other States seems to be in keeping with the rulings of the Kentucky Appellate Court. A brief mention of decisions elsewhere is here made only to exhibit the trend of the decisions. The citations will also serve the purpose of emphasizing our contention that there is present in the record no constitutional question; the only controversy being

the proper interpretation of the assessment laws of the State.

In the case of Cicero vs. Chicago R. R. Co., 176 Ill., 501, the Court reviews a great number of cases decided by the Supreme Court of Illinois, and concludes as follows:

> "Under the cases cited, we regard the question settled that a street railway occupying a public street is liable to be assessed for a local improvement in the same manner as other property owners."

In Indianapolis & V. R. R. Co. vs. Capitol Paving & Const. Co., 54 N. E., 1076, the Indiana Appellate Court defines the term "lot" as employed in a statute providing for special assessment and its application to a railroad right of way.

> "It is further argued that the assessment is void because appellant's right of way is not 'lands or lots' within the meaning of the charter. A railroad company has an easement in grounds occupied by its tracks. An easement is an incorporeal right created by grant, and always carries with it an interest in the land in or over which it is to be enjoyed. 2 Minor Inst., 20 et seq. In some jurisdictions it is held that a street assessment cannot be enforced against a railroad's abutting right of way, because it is not land, and because public policy forbids the severance of the several parts essential to the use and operation of the road. See Chicago, M. & St. P. Ry. Co. vs. City of Milwaukee, 89 Wis., 506, 62 N. W., 417. But it has been held in this State that the right of way of a railway company abutting upon or bordering upon a street may be assessed for the improvement of the street. Railroad Co. vs. Hanna, 68 Ind., 562, and cases there cited; Railroad Co. vs. Hays, 17 Ind. App., 261, 44 N. E., 375; 45 N. E., 675, and 46 N. E., 597. See also Patterson & H. R. R. Co. vs. City of Passaic, 54 N. J. Law, 340; 23 Atl., 945."

In Paterson R. R. Co. vs. City of Passaic, 54 N. J. Law, 341, is found the following:

> "The cases of New Jersey R. Co. vs. City of Elizabeth, 8 Broom, 330, and Jersey City ads. New Jersey Midland Railroad Co., 13 Ib. 97, are authority for the proposition that the roadbed of the railroad company is property legally subject to assessment for municipal benefits."

The rule to be gathered from the collected adjudications on

the subject is laid down in Smith on Modern Law of Municipal Corporations, Sec. 1239, in this language:

> "Where the statute authorizes assessment for local improvements against abutting property, the right of way of a railroad company is assessable; and it need not be made against the right of way as an entirety, but may be against that part only which fronts on the improvement. A railroad right of way parallel to a street may be specially assessed for local improvements; but not where it is across the street; and so may lands used for a depot, warehouse, roundhouse and shops."

V.

The cases referred to by opposing counsel are not numerous, and simply evidence a difference of opinion as to the proper construction of assessment statutes. In two of the cases cited in support of the position taken by plaintiff in error, it is expressly stated that "Kentucky, New Jersey, Illinois, Ohio, California and Indiana hold that under the statutes of those States the right of way of a railroad is assessable for local improvements." Railroad vs. Milwaukee, 87 Wisc., 517; Railroad vs. City of Ottumwa, 112 Iowa, 304.

To sanction the contention of the Railroad Company in this case would seem to offer an easy method of avoiding all special assessments. A merchant, a manufacturer or a warehouseman, instead of taking a fee simple title to real estate, would have granted them a perpetual user to the property for purposes necessary to the transaction of their business. Then by showing that the improvement of a highway did not promote their business (hauling being done from another door and over another street) and further representing that they had only a right of way in the property, all burdens of local taxation could be avoided. This is a sure and certain deduction from the argument of counsel for plaintiff in error, and in its manifest unsoundness is presented a complete answer to the contentions made by our adversary.

It would seem that no property in the community ought in fairness and as a matter of common sense contribute more certainly to the cost of improvements than a railroad, regardless whether the property taxed be a freight depot, a passenger station or a right of way adjacent to such depot and sta-

tion. The special use made of the property on the day the assessment is made, ought not to determine the question of liability to or exemption from taxation. Tomorrow a depot for freight and passengers may be located on or in connection with the property taxed, and the greatest benefit obtained from the improvement of the adjacent street which affords access to the railroad and makes the operation of its system not only profitable but possible.

Respectfully submitted,

BENJAMIN F. WASHER,
WILLIAM FURLONG,
Counsel for the Defendant in Error,
Barber Asphalt Paving Co.

HENRY L. STONE,
Counsel for the Defendant in Error,
City of Louisville.

APPENDIX.

The Statutes of Kentucky regulating special assessments for the costs of local improvement were in 1900 (and still remain in so far as this case is concerned) as follows: The sections quoted are portions of an act of the Kentucky Legislature, entitled, "An Act for the Government of Cities of the First Class," and are to be found in a compilation, officially termed, Kentucky Statutes:

Public Ways.

Section 2832. **Public Ways—Improvements—Meaning of Terms.** Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed herein.

Section 2833. **(Original Construction—Cost—Square Defined—Territory Not Defined—Wells and Cisterns—Lien.)** When the improvement is the original construction of any street, road, lane, alley, or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Board of Public Works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively, within the depth, as set out in the ordinance. The General Council shall have power by ordinance, recommended by the Board of Public Works, to cause the digging and the walling

of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes in the public ways, and to apportion the cost thereof exclusively against the owners of lots fronting the public ways to the middle of each square from the intersection at or near which the work shall be located, according to the number of square feet in such lots, or in any other equitable mode of apportionment which the General Council may prescribe by ordinance, and lien shall exist against such lots for the respective apportionments by the Board of Public Works, of the cost of digging and walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes, with interest from the date of the apportionment at the rate of six per cent. per annum until paid. **(Section as amended by act of March 19, 1898, making radical changes in old section.)**

Section 2834. **Lien for Cost of Constructing Public Ways, Sidewalks, Wells and Cisterns—Passage of Ordinance.** A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the General Council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the General Council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned; and in no event, if such improvement be made, as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards of the General Council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other.

Section 2835. **Sidewalks and Curbing—Apportionment of Costs.** The cost of making sidewalks, including curbing,

whether by original construction or reconstruction, shall be apportioned to the front foot, as owned by the parties respectively fronting said improvement, except that each corner lot shall pay the cost of its sidewalk intersection.

Section 2836. **Property Owners Permitted to Improve Public Ways.** The Board of Public Works may, in its discretion, upon a petition of a majority of the property owners on the part of the public way proposed to be improved, grant them permission to improve said public way, under the supervision of and within such time as may be fixed by the Board of Public Works.

Section 2837. **Inspection and Reception of Work—Publication of Notice.** When improvements in public ways have been made, or public wells or cisterns dug and walled, and the contract therefor completed, the Board of Public Works shall, by one insertion in one of the daily newspapers published in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents, and representatives, may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor.

Section 2838. **Action to Enforce Lien—Evidence—Provision for Redemption.** In all actions to enforce liens, a copy of the ordinance authorizing the improvements or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be **prima facie** evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be **prima facie** evidence of every other fact necessary to be established by the plaintiff in such actions to entitle him to the relief authorized to be given in this act. In such actions the court shall provide, in its order confirming any report of sale, that the defendants, or either of them, or any one claiming through or under them, or either of them, or any creditors of theirs, or either of them, may, within two years from the date of such order confirming a report of sale, redeem the land sold by paying to the purchaser the purchase price, with interest thereon from the day of sale, at the rate of six per cent.

per annum, and all the taxes and assessments on and against such land paid by such purchaser, with interest thereon at the rate of six per cent. per annum from the date of such payments; and in the event that there be no redemption within the time allowed, the order of confirmation shall be final, and a deed shall be executed to the purchaser or his assignee.

Section 2839. **Apportionment Warrants—Registration—Lien.** The Board of Public Works shall make out all apportionment warrants for which liens are given for improvements of public ways, wells, cisterns, water plugs, and sidewalks as may be required by ordinance, and within two days thereafter shall enter the same upon a register kept in alphabetical order for that purpose. When the holder of said warrant shall have obtained payment he shall notify the Board of Public Works, and it shall be marked upon the register as paid. The lien shall exist from the date of the apportionment warrant; but a lien shall not be valid against a purchaser for valuable consideration without notice, unless it shall be so entered and registered within ten days of the issuing of the apportionment warrant.